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**The Judea and Samaria Area
Office of the Legal Advisor
P.O.B. 5, Beit El 90631
Tel: 02-9977071/711
Fax: 02-9977326
709574 – 222/20**

**24 Av 5770
August 4 2010**

**Elad Kahana, Att.
Hamoked Center for the Defence of the Individual
By fax 02-6276317**

Greetings, Dear Colleague,

Re: **The Order on the Prevention of Infiltration (Amendment No. 2)
and the Order on Security Provisions (Amendment No. 112) –
Response to a Further Letter**

Yours: 65091 of June 8, 2010

Ours: 707660 of May 13, 2010

General

1. I hereby acknowledge receipt of your letter referenced above, concerning the legislative amendments in the above reference. Prior to addressing the claims mentioned in the letter per se, I remind that both legislative amendments in the above reference were assimilated to the Order regarding Security Provisions [integrated Version] (Judea and Samaria) (no. 1651), 5769-2009 (hereinafter: "**the integrated version**"), which entered into force on May 2, 2010, and integrated within it the main criminal legislation in Judea and Samaria. Therefore, and for the sake of facilitation, our consideration will refer to the sections as integrated version.
2. Regarding your question about the relation between the Order regarding Prevention of Infiltration and the Declaration regarding Closed Zones (the Order regarding Closed Zones (West Bank Area) (Amendment) (No. 34), 5727-1967), we reply that the declaration defines the closed zone and the terms of entry thereto, and the Infiltration

Order (which, as mentioned, is now assimilated into the integrated version) defines the consequences of a violation of the declaration regarding the closure of an area – the offence of infiltration, the ability to issue a deportation order against the violator etc.. Furthermore, it needs reminding, that the authority of the military commander to remove an individual from a closed zone, according to section 318 of the integrated version (section 90 of the original Order regarding Security Provisions), has not been revoked and this authority is indeed a parallel authority to the authority stipulated in the Order regarding Prevention of Infiltration.

Definition of an Infiltrator

3. Regarding the definition of an infiltrator, we cannot accept the interpretation you propose. Firstly, our position regarding residents of Gaza who are present in the Judea and Samaria Area without a permit is known, and has been declared before the court on several past occasions. As stated in our previous letter, your position on the issue of principle was presented before the court in HCJ 660/08 **Amer** and the state's position was also presented, and we can but wait the court's ruling on the matter.
4. Nonetheless, we remind that the question of the status of Gaza residents, who are present in Judea and Samaria without a permit, is **political** in essence, unlike the policy of removals from Judea and Samaria which is formulated by the military commander.
5. With regard to your claim concerning a person who entered with a permit, that was then violated or expired, and also regarding HCJ 2786/09 **Salem** and HCJ 8729/09 **Suali**, our position is known and has been declared before the court in these cases. We consider that the court's remarks in these cases did not pertain to the question of the military commander's authority, but rather to the question of the reasonableness of the discretion exercised regarding both cases. With regard to the question of authority, indeed the Supreme Court has previously ruled that the military commander is authorized to remove Gaza residents from the Judea and Samaria Area, thus, *inter alia*, in HCJ 8731/09 **Berlanty Azzam**.
6. In this context, note that in our view, there is no impediment to continue returning to Gaza those residents of Gaza who are present in Judea and Samaria without a permit issued under the general authority of the military commander, as stipulated in section 318 of the integrated version, as conducted until now. However, as a matter of policy and for the benefit of the Gaza residents who are unlawfully present in Judea and Samaria, it was decided that the procedure of their return to the Gaza Strip would be subject to judicial review by the Committee for the Examination of Deportation Orders. Insofar as you deem it proper to revise this decision and continue returning Gaza residents to the Gaza Strip as conducted until now, we request your informed position on the matter, to enable us to reconsider the decision.
7. Regarding the deleted definition of "resident of the Area" and the provision giving rise to the presumption of infiltration, note this provision was replaced with a parallel provision that establishes a similar presumption – section 304 of the incorporated version. In our view, the new provision is more lenient as it does not require proof of **residency** in the Area, but just of lawful presence, which is certainly the easier to prove.

8. Regarding the entering of foreign nationals in the registry, note the deleted registration in the few cases you mentioned, passed the scrutiny of the Supreme Court, and was sanctioned by it, in view of an error discovered in the processing of these cases, which was swiftly put right. Surely, so few cases cannot serve to instruct as to the entire political gesture, whereby thousands of residents of Judea and Samaria were granted status and were registered as such.

Criminal Liability

9. Regarding criminal liability, you claim that previously a person who lawfully entered the Area, could not have been criminally charged, in any event, and that this new definition bears retroactive repercussions on a vast number of people. We cannot concede on this issue.

As known, section 90 of the Order regarding Security Provisions (Judea and Samaria) (no. 378), 5730-1970 (hereinafter: "**the Order regarding Security Provisions**") stipulated that the military commander is entitled to declare the closure of an area and order to leave it. Therefore, even prior to the current legislative amendments, a person who lawfully entered the area but stayed on without a permit had committed a criminal offence under the Order regarding Security Provisions, albeit without being designated as "infiltrator" under the Order regarding Prevention of Infiltration in its original version. The state had presented its position in the matter in petitions regarding the removal of Gaza residents from the Judea and Samaria Area.

10. It is significant to recall in this regard, that according to the Order regarding Security Provisions, the penalty for such an offence was **5 years'** imprisonment. Now, with the legislative amendment and the penalties set forth regarding infiltrators, a lenient penalty was set forth regarding those who entered the Area lawfully but stayed on unlawfully, set at three years' imprisonment. It is evident that in constructing a specific offence relative to these persons in lieu of the general offence for the violation of declarations of closed areas has brought about penal leniency in their regard.

Judicial Review

11. In this regard, we clarify that the amendment was intended to guarantee a judicial review of the holding of a person in **custody**, as mandated by the ruling of the Supreme Court. However, and since the issues are closely linked, the examination committee received powers over relevant questions, among them the power to uphold a deportation order, revised or unrevised, and to revoke a deportation order if the committee was convinced that the person in custody is not an infiltrator, etc. We thus consider that the order indeed guarantees judicial review of custody.
12. In the matter of the judicial review of the deportation order, note the amendment was not intended to mandate the said review in all cases, and it will be made possible, as now, by appealing to the Supreme Court. To our understanding, such is the scope of review ordered by the court in HCJ 2737/04 **Kafarneh v. The IDF Commander in Gaza**:

"The state ought to act early for the establishment of a **mechanism of "internal" judicial review – alongside this court's review** – of the **holding of persons banished** under the security legislation in the Area [...] As any proceeding involving the denial of liberty, also the holding of such banished persons ought to be carried out according to clear and defined rules, and be subject to periodic judicial review". [emphasis added]

As said, it is the holding in custody that is subjected to the review and not the deportation per se. We recall that within Israel also, deportation orders issued by the Minister of Interior under the Entry into Israel Law are not subject to review before the Custody Court, and inasmuch as there is a wish to challenge the deportation order itself, this is accomplished in a separate proceeding, through a petition to the Court for Administrative Affairs.

13. Regarding immediate deportation, we recall that contrary to the previous legal situation, the current legislative amendment expressly stipulates that an infiltrator can be deported only after 72 hours passed from the delivery of the written deportation order, unless the deportee has previously agreed to the deportation (section 301(6)). Therefore, we are unclear as to why a further express stipulation is needed to the effect that a person shall not be deported prior to presenting his case before the court, considering that a person who wishes to present his case before the court will be able to do so in the said period at his disposal.
14. Regarding the possibility of delaying the deportation, note the final clause of section 301(6) allows the military commander to delay the date of deportation, at the request of the person against whom the deportation order was issued. Obviously, in this regard, the military commander will give greater credence to the recommendation of the committee.

Holding in Custody

15. Regarding the differences between Israel and the Area relative the periods of holding in custody, we note the issue was examined during the preliminary staff work for the legislative amendment. In view of the disparity in the security situation between Israel and the Area and the risk posed by some of the infiltrators, in view of their involvement in hostile terrorist activity or criminal activity, as well as past difficulties that arose in deporting infiltrators who came from enemy states with which there are no diplomatic relations, and without documentation - which causes the origin state to renounce them, or those who came from countries that on occasion refuse their residents' return into their territory, it was deemed justifiable to create a difference in the periods of judicial review of custody between the Area and Israel.
16. Regarding your claim on the requirement placed on a detainee to advance his deportation to whichever county, we recall that this requirement was not disqualified by the court. In HCJ 1268/10, the military commander agreed to release the petitioner from custody, in view of his detention period, the unfavorable security material against him and the other circumstances at issue. The deportation order in the case was not revoked, and the petitioner was required to appeal to Jordan to receive travel documents. The remarks of the court in this matter addressed the question whether the intended deportee or the military commander should apply to **additional countries** to inquire into the possible acceptance of the intended deportee into their territory.

In this matter, even if we accept your claim to the effect that this is liable to bind the judicial discretion, we consider that in view of the potential security circumstances involved in releasing intended deportees from custody - some of whom are suspect (or even convicted) of committing serious crimes against the security of the Area, this goes to justify the discretionary restrictions, particularly when dealing with a committee whose purpose is the examination of the **holding in custody**.

17. Finally, regarding your question relative the status of a person designated for release by the committee, note the issue is currently under examination. You will be notified once a decision is reached.
18. **In conclusion**, in view of all of the above, as well as in our previous letter in reference, we found no cause to make additional legislative amendments at this stage or order the revocation of the legislative amendments at issue.

Sincerely,

[signature]

Limor Tachnai, Major
Head of Population Registry Section
On behalf of the Legal Advisor

cc: Bureau Chief of the Military Advocate General
Bureau Chief of the GOC Central Command
Assistant Coordinator
Legal Advisor to the Defense Agencies
Assistant Head of National Section
Bureau Chief, the Judea and Samaria Division
Deputy Attorney General (Consultation) – Att. Mike Balas
Director of HCJ Department - Att. Osnat Mandel
Senior Assistant to the Attorney General – Adv. Raz Nizri
Military Advocate General Headquarters – Head of International Law
Department